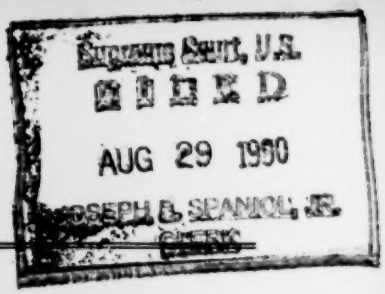
90-557



No. _____

In The

Supreme Court of the United States

October Term, 1990

MICHAEL S. CARDWELL, M.D.,

Petitioner,

vs.

ROCKFORD MEMORIAL HOSPITAL
a Corporation, and
TERRY A. WHITE, Assistant
Administrator of Rockford Memorial
Hospital Association, a Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

J.C. Hambrick, Jr.*
Catherine A. Reinmiller
Schulz, Bender, Maher & Blair, P.C.
8320 North Oak Trafficway
Suite 220
Kansas City, Missouri 64118
(816) 436-2700
* Counsel of Record
Counsel for Petitioner

QUESTION PRESENTED

Whether a state's interest in regulating clinical practices and in providing adequate hospital care, codified in the state peer review committee act, can override all constitutional privacy, liberty and equal protection rights of a health care provider, by providing absolute immunity from civil liability to the peer review committee and its individuals.

LIST OF PARTIES

Plaintiff/Petitioner: Michael S. Cardwell

Defendants/Respondents: Rockford Memorial Hospital Association*
Terry A. White

---

*Rockford Memorial Hospital Association is now Rockford Memorial Hospital and is wholly owned by Rockford Memorial Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1-3

STATEMENT 3-5

REASONS FOR GRANTING THE PETITION 5-8

CONCLUSION 8

APPENDICES:

A. Illinois Supreme Court ..... App. 1

B. Opinion of Justice Clark ..... App. 2 - App. 11

C. Opinion of the Appellate Court of Illinois ..... App. 12 - App. 22

D. Order of Dismissal ..... App. 23 - App. 25

TABLE OF AUTHORITIES

Cases:

Griswold v. Connecticut, 381 U.S. 479, 485 (1965) 7

Howard University v. National Collegiate Athletic Association, 510 F.2d 213 (D.C. Cir. 1975) . 8

Olmstead v. United States, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting) 7

Rochin v. California, 342 U.S. 165, 172 (1952) . . . 7

Roe v. Wade, 410 U.S. 113 (1973) 7

Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) 7

Constitution and Statutes:

United States Constitution

Amendment IV 1,6

Amendment V 2,6

Amendment IX 2,6

Amendment XIV 2,6

Ill. Rev. Stat. 1987, ch. 111, par. 4400-5. 3

Ill. Rev. Stat. ch. 111 1/2, par. 151.2 (1985) 2

No. _____

In The

Supreme Court of the United States

October Term, 1990

MICHAEL S. CARDWELL, M.D.,

Petitioner,

vs.

ROCKFORD MEMORIAL HOSPITAL, a Corporation, and TERRY A. WHITE, Assistant Administrator of Rockford Memorial Hospital, a Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

J.C. Hambrick, Jr.*
Catherine A. Reinmiller
Schulz, Bender, Maher & Blair, P.C.
8320 North Oak Trafficway
Suite 220
Kansas City, Missouri 64118
(816) 436-2700
* Counsel of Record
Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

The petitioner Michael S. Cardwell, M.D., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Illinois Supreme Court in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (App., infra, p.1) is reported at 136 Ill. 2d 271; 555 N.E. 2d 6 (Ill. 1990). The opinion of the Appellate Court of Illinois (App., infra, p.8) is reported at 183 Ill. App. 3d 1072, 539 N.E. 2d 1322 (Ill. App. 1989). The opinion of the Circuit Court of Winnebago County, Illinois, is not reported. It is reprinted in the Appendix, infra, p.28.

JURISDICTION

The Circuit Court for Winnebago County, Illinois entered its order of dismissal on August 5, 1988. On June 7, 1989, the Appellate Court of Illinois affirmed the trial court, by holding that Illinois' peer review groups are absolutely immune from civil liability. On April 18, 1990, the Illinois Supreme Court affirmed the Appellate Court of Illinois. Thereafter, on May 31, 1990, the Illinois Supreme Court denied a timely petition for rehearing. The court has authority to review this decision pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by

Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War on public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Hospital Licensing Act, Ill. Rev. Stat. ch. 111 1/2, par. 151.2 (1985), provides in pertinent part:

"Because of the candid and conscientious evaluation of clinical practices is essential to the provision of adequate hospital care, it is the policy of this State to encourage peer review by health care providers. Therefore, no hospital and no individual who is a member, agent, or employee of a hospital, hospital medical staff, hospital administrative staff, or hospital governing board shall be liable for civil damages as a result of the acts, omissions, decisions, or any other conduct of a medical utilization committee, medical review committee, patient care

audit committee, medical care evaluation committee, quality review committee, credential committee, peer review committee, or any other committee whose purpose, directly or indirectly, is internal quality control or medical study to reduce morbidity or mortality, or for improving patient care within a hospital, or the improving or benefiting of patient care and treatment, whether within a hospital or not, or for the purpose of professional discipline. Nothing in this Section shall relieve any individual or hospital from liability arising from treatment of a patient."

The Medical Practice Act, Ill. Rev. Stat. ch. 111, par. 4406 (1985), provides in pertinent part:

"While serving upon any committee whose purpose, directly or indirectly, is internal quality control or medical study to reduce morbidity or mortality, or for improving patient care or physician services within a hospital duly licensed under the Hospital Licensing Act, or within a professional association of persons licensed under this Act, or within a professional association of persons licensed under this Act, or the improving or benefiting of patient care and treatment whether within a hospital or not, or for the purpose of professional discipline, any person serving on such committee, and any person providing service to such committees, shall not be liable for civil damages as a result of their act,s omissions, decisions, or any other conduct in connection with their duties on such committees, except those involving wilful or wanton misconduct." Ill. Rev. Stat. 1987, ch. 111, par. 4400-5.

STATEMENT OF THE CASE

Michael S. Cardwell, M.D. was a perinatalogist (specialist in the care and treatment of high risk fetuses) employed by the Defendant Hospital under written contract as medical director of the department of perinatalogy. Dr. John McHugh formed a committee consisting of himself, Defendant White, Dr. William Rouse and Dr. Richard Novak and met on August 29, 1985 for the purpose of confronting Dr. Cardwell

and suggesting that he had a drug, alcohol or emotional problem that required intervention.

They advised Dr. Cardwell that he was to attend a meeting and when he arrived at the meeting he was confronted with the allegations and requested to submit to a psychiatric evaluation to be conducted later that day. Initially, Dr. Cardwell refused the request and asked to seek advice from counsel. He was advised by this group that his refusal to immediately undergo the evaluation would result in the immediate revocation of his privileges at the hospital. Such a revocation, even temporary would become a permanent part of his employment record. Faced with the loss of position, Dr. Cardwell submitted to the exam that same day. The exam had already been scheduled and was to take place in Chicago, Illinois. Dr. Cardwell was immediately transported to Chicago for the exam. The court record did not speak to the result, except to say that Dr. Cardwell was not hospitalized. The report by Dr. Sellers stated that there was no evidence of alcohol or drug abuse. After the exam Dr. Cardwell was immediately returned to the Defendant Hospital.

Two days later, the Defendant hospital requested that Dr. Cardwell enter into a new employment agreement with them. In 1986, Dr. Cardwell resigned from the hospital and on August 26, 1986, filed an initial complaint against these same defendants, which was dismissed.

On December 11, 1987, Plaintiff filed a four count petition seeking recovery on theories of slander, coercion, intentional infliction of emotional distress and intentional interference with an employment contract. The Defendants sought a motion to dismiss relying on the immunity provided in the above designated hospital statutes. The trial court determined that the conduct, even if intentional, fell within the immunity provided under the statutes. The Plaintiff filed a timely appeal and presented the two questions designated above. The Illinois Court of Appeals affirmed the trial court decision in a two to one decision. The Illinois Court of Appeals notes that the Hospital Licensing Act and the Medical Practices Act of 1987 grant immunity for hospitals and their

staff from civil liability for services rendered while serving in the capacity of a medical care evaluation committee or peer review committee and precludes recovery of civil damages as a remedy in cases arising out of acts and decisions of hospitals and individuals in internal review situations. Although the trial court found that based upon affidavits, the informally set-up committee fell within the conditional immunity granted by the statute, the appeals court determines the Hospital Licensing Act grants absolute immunity even when relating to intentional acts.

Justice Nash filed a dissent stating that the court "has no authority to repeal the legislation exception to wilful and wanton peer review conduct and do no service to the medical community by doing so. Under the opinion here, any baseless or malicious accusation can be made in a supposed peer review setting with impunity.

The Plaintiff filed a timely appeal to the Illinois Supreme Court presenting the same issues. The Supreme Court of Illinois affirmed the trial court determination without dissent and denied a request for rehearing on May 31, 1990. The Supreme Court affirms the decision without regard to whether the conduct was wilful and wanton. They conclude that it is irrelevant whether the hospital or White was wilful or wanton in their conduct, but that as a hospital and an employee of a hospital they have absolute immunity.

REASONS FOR GRANTING THE PETITION

The Supreme Court of Illinois has granted absolute immunity to hospitals and hospital employees from civil liability for the conduct of hospital review committees. The supreme court's decision is based on its interpretation of Ill. Rev. Stat. ch. 111 1/2, § 151.2 (1985) that the plain language of the statute provides for absolute immunity. The court's interpretation is in conflict with other state's peer review

statutes[2], as well as the rights granted to citizens of the United States under the fourth amendment, fifth amendment, and the fourteenth amendment of the Constitution of the United States.

In providing absolute immunity to medical peer review groups in the State of Illinois, the citizens of the United States are being subjected to having their privacy rights invaded, as well as not being afforded their right of equal protection and liberty. In the present case, the Petitioner was forced to undergo a drug and psychiatric evaluation causing loss to his reputation, or, in the alternative, losing his staffing privileges, a loss of property. These facts are indicative of what will occur in the future to other health care providers who chose to practice in the State of Illinois. No other state has provided for such unbridled immunity. All states, other than the State of Illinois, require that the investigation and the review process be conducted in good faith and without malice.

The decision of the Supreme Court of Illinois in granting peer review committees and their individuals absolute immunity from civil liability, has held that health care providers in the State of Illinois do not retain the federal right of privacy

---

[2]We have not yet found any state, other than Illinois, that grants absolute immunity to its hospitals and individuals involved in peer review.

Cal Civ Code @ 43.7; Colo Rev. St. 12-36.5-105 (1989); Conn. Gen. Stat. @38-19a; Del ALS 226. Section 18., @ (1990); Fla. Stat. @ 395.0115 (1989); O.C.G.A. @ 43-34-37 (1989); HRS @ 435E-34 (1989); HRS @ 663-1.7 (1989); Ind. Code. Ann. @ 34-4-12.6-1 (1989); Ia. ALS 2518. Section 7., 147.135 (1990); KRS Ann. @ 311.377 (1988); KRS Ann. @ 311.603 (1988); Md. ALS 546 (1990); 537.035 R.S.Mo. (1989); MONT CODE ANN; Neb. LB 1136. 1990; NY CLS Pub Health @ 230(8)(1989); N CAR HOS LIC ACT., @ 131E-95; ORC Ann. @ 2305.25 (1990); ORS @ 441.055 (1989); R.I. Gen. Laws @ 5-37-1.5; Tenn. Code Ann. @ 63-6-219(b)(1989); 1990 Ut. ALS 249; Va. Code @ 30-3-14 (1989); Wis. Stat. @ 619.04 (1987-88).

against governmental invasions of the body, i.e., drug testing and psychiatric evaluation. This Court has long protected individuals against such invasions of the body. Rochin v. California, 342 U.S. 165, 172 (1952)("The integrity of an individual's person is a cherished value of our society"); see Olmstead v. United States, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting)("The makers of our Constitution . . . conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men"). The Court has likewise long recognized and protected an individual's right to self-determination, which allows a person to control decisions made about his own body. See, e.g., Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)("No right is held more sacred . . . than the right of every person to the possession and control of his own person").

The right has been characterized as a liberty interest protected by the Due Process Clause of the Fourteenth Amendment and more recently as a privacy right which springs from the penumbra of personal freedoms created by the Bill of Rights. See Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479, 485 (1965). However labelled, this fundamental right should extend to all citizens who find themselves before a peer review committee in the State of Illinois and are forced to undergo drug testing or other similar invasions of the body, without any avenue of recourse available to them when the peer review committee does not act in good faith, but rather with malice. A failure to limit this invasion without recourse will allow individuals cloaked with government-sanctioned immunity to ruin the lives and careers of citizens.

As with all invasion of privacy claims, there must be state action involved. Such state action is present in this case. The peer review process in the State of Illinois has been established and regulated by the state. Assuming arguendo, that absolute immunity is provided to the peer review committee and its individuals, such immunity was provided by state action. The State of Illinois is so intertwined in the regulation of its clinical practices whether in public institutions or private institutions which receive public moneys, that this

governmental involvement, though not exclusive, is significant such that all actions of the Defendant hospital and/or the peer review committee appear impregnated with a governmental character. See Howard University v. National Collegiate Athletic Association, 510 F.2d 213 (D.C. Cir. 1975). Moreover, the lower courts have made no distinction between a private hospital and a public hospital holding that absolute immunity applies to all peer review committees.

The majority in Caldwell has ruled that health care providers in Illinois shall not be provided the protection and the rights granted to other citizens in the state of Illinois, as well as the citizens of the United States, under the Bill of Rights and the Constitution of the United States. This holding is a direct infringement on the equal protection, privacy and liberty rights of a health care provider. Moreover, the Illinois statute, assuming arguendo that it provides for absolute immunity, is constitutionally invalid on its face. The majority decision has left health care providers without legal options and stripped of constitutional rights protected by other states' courts and legislatures and long guaranteed by this Court. Immediate review by this Court is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

SCHULZ, BENDER, MAHER & BLAIR, P.C.

By _____
J.C. Hambrick, Jr., #28165*

By _____
Catherine A. Reinmiller, #38453
8320 North Oak Trafficway, Suite 220
Kansas City, Missouri 64118
(816) 436-2700
Fax No. (816) 436-8443

*Counsel of Record
COUNSEL FOR PETITIONER

APPENDIX A

IN THE ILLINOIS SUPREME COURT
APPELLATE COURT/SECOND DISTRICT

MICHAEL S. CARDWELL,	)	
	)	
Appellant,	)	
	)	No. 68906
vs.	)	
	)	
ROCKFORD MEMORIAL HOSPITAL, et al.,	)	
	)	
Appellees.	)	

The Supreme Court on May 31, 1990 DENIED the petition for rehearing in the above-entitled cause.

Ryan J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 11, 1990.

APPENDIX B

136 Ill. 2d 271
Michael S. CARDWELL,
M.D., Appellant,

v.

ROCKFORD MEMORIAL HOSPITAL
ASSOCIATION, et al., Appellees.

No. 68906.

Supreme Court of Illinois.

April 18, 1990.

Rehearing Denied May 31, 1990.

Hospital physician, who resigned following peer review committee's evaluation of his suspected alcohol, drug, or emotional problem, brought action against hospital association and assistant hospital administrator for slander, coercion, intentional infliction of emotional distress, and intentional interference with employment contract. The Circuit Court, Winnebago County, John E. Sype, J., dismissed complaint, and physician appealed. The Appellate Court, 183 Ill. App. 3d 1072, 132 Ill. Dec. 516, 539 N.E. 2d 1322, affirmed, and physician petitioned for leave to appeal. The Supreme Court, Clark, J., held that hospital and administrator were absolutely immune from civil liability for conduct of hospital peer review committee, even if conduct was willful or wanton.

Affirmed.

1. Hospitals (Key) 3

Amendment to Hospital Licensing Act, which provides that it is policy of state to encourage peer review by health care

providers, does not apply retroactively. S.H.A. ch. 111 1/2, ¶ 151.2.

2. Hospitals (Key) 3

Amendment to Medical Practice Act regarding immunity for persons serving on or providing service to hospital peer review committees does not apply retroactively. S.H.A. ch. 111, ¶ 4400-5; Ill. Rev. Stat. 1985, ch. 111, ¶ 4406.

3. Hospitals (Key) 7

Hospital Licensing Act, which creates immunity from civil liability for conduct of hospital peer review committees, does not explicitly or implicitly incorporate Medical Practice Act's exception from immunity for willful and wanton misconduct. S.H.A. ch. 111 1/2, ¶ 151.2; Ill. Rev. Stat. 1985, ch. 111, ¶ 4406.

4. Hospitals (Key) 7

Hospital and assistant administrator had absolute immunity from civil liability under Hospital Licensing Act in action for slander, coercion, intentional infliction with employment contract brought by physician, who alleged that statements made by members of hospital peer review committee accusing physician of alcohol addiction, drug addiction, or mental instability were false and malicious, even if such conduct was willful or wanton. S.H.A. ch. 111 1/2 ¶ 151.2.

William T. Cacciatore, Rockford, for appellant.

Richard R. Haldeman and Stephen E. Balogh, Williams & McCarthy, Rockford, for appellees.

John T. Bomher and Mark D. Deaton, Naperville, and Michael R. Callahan and Laura R. Keidan, Katten, Muchin &

Zavis, Chicago, for the amici cruiae Illinois Hospital Association and the Metropolitan Chicago Healthcare Council.

JUSTICE CLARK delivered the opinion of the court:

The sole issue here is whether hospitals and hospital employees are immune from civil liability for the conduct of hospital review committees.

The facts in this case are set forth at length in the appellate court opinion (183 Ill. App. 3d 1072) and need only be summarized here. Appellant, Michael S. Cardwell, M.D., was a doctor employed by appellee Rockford Memorial Hospital Association (the hospital). Appellee Terry A. White (White) is an administrator of the hospital who was appellant's supervisor. On August 29, 1985, four employees of the hospital (including White) formed a committee to confront appellant about the possibility that appellant was suffering from a drug, alcohol, emotional or mental problem which was adversely affecting the quality of appellant's treatment of patients. The committee informed appellant that he would lose his hospital staff privileges unless he underwent a psychiatric examination by a specialist in the treatment of impaired physicians. Appellant eventually underwent such an evaluation. Except for an indication that appellant did not need hospitalization for his alleged problems, the record is silent as to the results of the evaluation. Appellant subsequently resigned from the staff of the hospital in early 1986.

On August 26, 1986, appellant filed a two-count complaint against White and the hospital. Appellant later added two additional counts to the complaint. The amended complaint sought to recover damages for slander, coercion, intentional infliction of emotional distress, and intentional interference with contract, because certain statements made by the committee members accusing appellant of alcohol addiction, drug addiction, and/or mental instability were allegedly false and malicious.

White and the hospital filed a joint motion to dismiss the complaint under section 2-619 of the Illinois Code of Civil

Procedure (Ill. Rev. Stat. 1987, ch. 110. par 2-619) on the grounds that White and the hospital were immune from liability for civil damages under section 10.2 of the Hospital Licensing Act (Ill. Rev. Stat. 1985, ch. 111 1/2 par. 151.2) and section 2b of the (now repealed) Medical Practice Act (Ill. Rev. Stat. 1985, ch. 111, par. 4406). The trial court found that the statutes cited by White and the hospital established a qualified immunity. The immunity was qualified, according to the trial court, in that it was not applicable where a party's conduct was willful or wanton. However, the trial court found that affidavits attached to the motion to dismiss established that the conduct of the hospital and White was not willful or wanton. The trial court therefore granted the motion to dismiss.

Appellant appealed the trial court's order, claiming that the trial court erred in concluding that the conduct of White and the hospital was not willful or wanton. The appellate court, however, found that the immunity for White and the hospital was absolute, not qualified, and therefore White and the hospital were immune even if their conduct had been willful or wanton. (183 Ill. App. 3d at 1076.) Accordingly, the appellate court affirmed the trial court's dismissal of the complaint. (183 Ill. App. 3d at 1079.) We granted appellant's petition for leave to appeal (107 Ill. 2d R. 315(a)). We also granted the Illinois Hospital Association and the Metropolitan Chicago Healthcare Council leave to file a brief as *amici curiae*.

Section 10.2 of the Hospital Licensing Act (Ill. Rev. Stat. 1985, ch. 111 1/2 par. 151.2), at the time the conduct in this case occurred (and at the time appellant filed his initial complaint commencing this action), provided:

> "No hospital and no individual who is a member, agent, or employee of a hospital, hospital medical staff, hospital administrative staff, or hospital governing board shall be liable for civil damages as a result of the acts, omissions, decisions, or any other conduct of a medical utilization committee, medical review committee, patient care audit committee, medical care evaluation committee, quality review

> committee, credential committee, peer review committee, or any other committee whose purpose, directly or indirectly, is internal quality control or medical study to reduce morbidity or mortality, or for improving patient care within a hospital, or the improving or benefiting of patient care and treatment, whether within a hospital or not, or for the purpose of professional discipline. Nothing in this Section shall relieve any individual or hospital from liability arising from treatment of a patient." (Ill. Rev. Stat. 1985, ch. 111 1/2 par. 151.2.)

In 1987, after this complaint was filed, the General Assembly added the following introductory sentence to section 10.2" "Because the candid and conscientious evaluation of clinical practices is essential to the provision of adequate hospital care, it is the policy of this State to encourage peer review by health care providers." (Ill. Rev. Stat. 1987, ch. 111 1/2 par. 151.2 (eff. September 20, 1987).) However, neither party argues, and we do not find, that the amendment should apply retroactively to this case. See *Mulligan v. Joliet Regional Port District* (1988), 123 Ill. 2d 303, 321 (a statute "cannot be applied retroactively *** without an express statutory provision stating that [the] act is to have retroactive effect").

Under the plain language of section 10.2, "hospital[s] and *** individual[s] who [were] member[s], agent[s], or employee[s] of a hospital, hospital medical staff, hospital administrative staff, or hospital governing board" (Ill. Rev. Stat. 1985, ch. 111 1/2 par. 151.2) were immune from civil liability for the conduct of the types of committees specified in the statute. In the present appeal, there is no dispute that the allegedly wrongful conduct in this case was conduct by a committee specified in the statute and that the appellees in this case, a hospital and a hospital administrator and employee, fell within the protection of the statute. Accordingly, under the plain language of section 10.2, the appellees are immune from civil liability.

Appellant, however, argues that we should read section 10.2 as incorporating an exception for willful or wanton misconduct that was provided for in section 2b of the Medical Practice Act (Ill. Rev. Stat. 1985, ch. 111. par. 4406). Section 2b provided:

> "While serving any Medical Utilization Committee, Medical Review Committee, Patient Care Audit Committee, Medical Care Evaluation Committee, Quality Review Committee, Credential Committee, Peer Review Committee, or any other committee whose purpose, directly or indirectly, is internal quality control or medical study to reduce morbidity or mortality, or for improving patient care within a hospital duly licensed under the Hospital Licensing Act, or the improving or benefiting of patient care and treatment whether within a hospital or not, or for the purpose of professional discipline, any person serving on such committee, and any person providing service to such committees shall not be liable for civil damages as a result of his acts, omissions, decisions, or any other conduct in connection with his duties on such committees, except those involving willful or wanton misconduct." (Emphasis added.) (Ill. Rev. Stat. 1985, ch. 111. par. 4406.)

Section 2b thus created an immunity for persons serving on or providing service to the identical types of committees covered by the immunity of section 10.2 of the Hospital Licensing Act (Ill. Rev. Stat. 1985. ch. 111 1/2, par. 151.2)

After the conduct in this case occurred in 1985 (and after appellant filed his initial complaint in this case in 1986), section 2b of the Medical Practice Act was repealed and replaced by similar language in section 5 of the Medical Practice Act of 1987 (Ill. Rev. Stat. 1987, ch. 111, par. 4400-5). The legislature specified that section 5 of the Medical Practice Act became effective on May 22, 1987. As we did with the amendment to section 10.2 of the Medical Licensing Act (Ill.

Rev. Stat. 1987, ch. 111, par. 151.2), we find that section 5 of the Medical Practice Act of 1987 should not be applied retroactively to this case. Instead, the question of immunity in this case must be decided based upon the language of section 2b of the Medical Practice Act (Ill. Rev. Stat. 1985. ch. 111, par. 4406).

Appellant incorrectly argues that section 10.2 incorporated section 2b's exception for willful or wanton misconduct because section 10.2 "specifically stated(d) that nothing provided therein would relieve any individual or hospital from liability." What section 10.2 actually stated is that "[n]othing in this Section shall relieve any individual or hospital from liability arising from treatment of a patient." (Emphasis added.) (Ill. Rev. Stat. 1985 ch. 111 1/2, par. 151.2) The liability involved in this case, and provided for in section 10.2 of the Hospital Licensing Act did not expressly incorporate the exception for willful or wanton misconduct contained in section 2b of the Medical Practice Act.

We similarly find that the exception contained in section 2b for willful or wanton misconduct was not implicitly incorporated in section 10.2. It is a basic rule of statutory construction that a statutory proviso or exception is "intended to qualify what is affirmed in the body of the act. section or paragraph preceding it." (Illinois Chiropractic Society v. Giello (1960), 18 Ill. 2d 306, 312; see also State Public Utilities Comm'n v. Early (1918), 295 Ill. 469, 475; 2A N. Singer, Sutherland on Statutory Construction §47.11, at 145 (Sands 4th ed. 1984).) We therefore must presume that the exception for willful or wanton misconduct that in contained in section 2b of the Medical practice Act was intended to apply only to the immunity created within that section of the Medical practice Act, and not to the entirely separate immunity created by section 10.2 of the Hospital Licensing Act.

Appellant next argues that public policy considerations indicate that the General Assembly could not have intended for section 10.2 to provide absolute immunity. However, we have already found that the plain language of the statute provides for absolute immunity and we know of "no rule of

construction which authorizes a court to declare that the legislature did not mean what the plain language of a statute imports." Droste v. Kerner (1966), 34 Ill. 2d 495,503.

Appellant's third argument is that an interpretation of section 10.2 as proving absolute immunity "would effectively repeal causes of action for liability predicated upon willful or wanton misconduct as provided by the Medical Practice Act." We do not agree.

Appellant misconstrues the purpose and effect of section 2b of the Medical Practice Act. Contrary to appellant's assertion, the Medical Practice Act particularly section 2b) did not create, provide or authorize a cause of action for misconduct involving hospital review committees. Instead, any cause of action for such misconduct had to have been based on the common law or a statute other than the Medical Practice Act. Section 2b of the Medical Practice Act merely established an immunity which could be invoked by a defendant as an affirmative defense to any such cause of action. To fall under the protection of the immunity of section 2b, a defendant had to demonstrate that he was a "person serving on [or] providing service to [a hospital review committee]" and that his conduct was not willful or wanton. Ill. Rev. Stat. 1985, ch. 111. par. 4406.

Section 10.2 of the Hospital Licensing Act also established an immunity which could be invoked by a defendant as an affirmative defense to causes of action arising out of conduct involving hospital review committees. Like section 2b of the Medical Practice Act, section 10.2 of the Hospital Licensing Act only applied in certain situations. To be protected by the immunity of section 10.2, a defendant had to establish that the defendant was a "hospital [or] individual who [was] a member, agent, or employee of a hospital, hospital medical staff, hospital administrative staff, or hospital governing board" (Ill. Rev. Stat. 1985, ch. 111 1/2, par. 151.2).

The General Assembly thus determined that, in certain situations, parties participating in the hospital review process should be immune from civil liability. One such situation, as

set forth in section 2b of the Medical Practice Act (Ill. Rev. Stat. 1985, ch. 111, par. 4406), was where a party involved in the hospital review process had not acted willfully or wantonly. A second situation, as set forth in section 10.2 of the Hospital Licensing Act (Ill. Rev. Stat. 1985, ch. 111 1/2, par. 151.2), was where a party was a "hospital [or] a member, agent, or employee of a hospital, hospital medical staff, hospital administrative staff, or hospital governing board."

The two immunities established by the General Assembly did not conflict. Rather, they presented two separate means by which a defendant could escape liability. In some instances, both immunities may have been available to the same party. For example, a defendant who was an employee of a hospital and whose conduct was not willful or wanton could have invoked both immunities as affirmative defenses. On the other hand, in other situations, such as where a defendant who was not a "hospital [or] a member, agent or employee of a hospital, hospital medical staff, hospital administrative staff, or hospital governing board" had engaged in willful or wanton misconduct, neither immunity would have been available. Whatever the situation, however, if the defendant could demonstrate that either of the immunities established by the General Assembly was applicable to his case, the defendant could not be held liable for civil damages.

In the present case, appellant filed a complaint seeking civil damages based upon four common law causes of action. Both White and the hospital, in their joint motion to dismiss the complaint pursuant to section 2-619 of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110. par. 2-619), claimed the separate immunities of section 2b and section 10.2 as affirmative defenses. While it is not clear whether their conduct was willful or wanton (and therefore whether the immunity of section 2b should be applicable), there is no dispute that both White (a hospital administrator and employee) and the hospital were protected by the immunity of section 10.2.)

We note that our decision is not inconsistent with this court's decisions in Adkins v. Sarah Bush Lincoln Health

Center (1989), 129 Ill. 2d 497, and Barrows v. Northwestern Memorial Hospital (1988), 123 Ill. 2d 49. In Adkins, this court found that there were no facts which indicated that the hospital and doctors in that case had acted willfully or wantonly. Accordingly, this court held that the hospital and doctors in that case were protected by the immunity of section 2b of the Medical Practice Act (Ill. Rev. Stat. 1985, ch. 111, par. 4406). (Adkins, 129 Ill. 2d at 518-19.) The question of whether the hospital and doctors in that case were also protected by the immunity of section 10.2 of the Hospital Licensing Act (Ill. Rev. Stat. 1985, ch. 111 1/2, par. 151.2) was never addressed. Similarly, in Barrows, 123 Ill. 2d at 59, the question of whether either immunity was available to the defendants in that case was not at issue, and therefore was not addressed.

We conclude that section 10.2 of the Hospital Licensing Act (Ill. Rev. Stat. 1985, ch. 111 1/2, par. 151.2) provides appellees with immunity in this case. In light of this conclusion, it is irrelevant whether appellees were also protected by the immunity provided by section 2b of the Medical Practice Act (Ill. Rev. Stat. 1985, ch. 111, par. 4406). Accordingly, the judgment of the appellate court affirming the trial court's dismissal of appellant's complaint is affirmed.

Judgment affirmed.

JUSTICE RYAN took no part in the consideration or decision of this case.

APPENDIX C

183 Ill. App. 3d 1072
132 Ill. Dec. 516

MICHAEL S. CARDWELL,
Plaintiff-Appellant,

v.

ROCKFORD MEMORIAL HOSPITAL ASSOCIATION et al.,
Defendants-Appellees.

No. 2-88-0870.

Appellate Court of Illinois
Second District

June 7, 1989.

Justice INGLIS delivered the opinion of the court:

Plaintiff, Dr. Michael S. Cardwell, appeals from an order of the circuit court of Winnebago County dismissing his complaint against defendants, Rockford Memorial Hospital Association (Hospital), and Terry A. White, individually and as assistant administrator of the Hospital. The trial court granted defendants' motion to dismiss pursuant to section 2-619(a)(9) of the code of Civil Procedure (Code) (Ill. Rev. Stat. 1987, ch. 110, par. 2-619(a)(9) on the basis that statutes and Hospital bylaws provided defendants with immunity for the conduct alleged in plaintiff's complaint. The sole issue on appeal is whether the trial court erred in granting defendants' motion to dismiss. We affirm.

In 1985, plaintiff was a perinatalogist (specialist in the care and treatment of high risk fetuses) employed by the Hospital under written contract as medical director of the department of perinatalogy. In May or June of that year, Gary Longanecker, administrator of the employee assistance program for the Hospital, began to suspect that plaintiff had a drinking problem. Longanecker's suspicion was fostered after smelling alcohol on plaintiff's breath during working hours on several different occasions. In August 1985, plaintiff's secretary, Alyce Lashock, approached Longanecker and advised him that she detected alcohol on plaintiff's breath while he was performing certain medical procedures. Lashock further stated that plaintiff was exhibiting "bizarre behavioral mood swings" and lapses of memory. Longanecker conveyed this information to Dr. William Rouse, chairman of the Hospital credentials committee, and defendant Terry White, assistant administrator of the Hospital and plaintiff's immediate supervisor.

White subsequently approached Lashock to discuss plaintiff's behavior. Lashock told White that she had witnessed abrupt changes in plaintiff's behavior during a three-to-four month period prior to August 1985. According to Lashock, plaintiff became volatile, secretive, hyperactive, and frantic. Lashock further related that plaintiff would disappear for periods of time and return "wired." Lashock advised White that

plaintiff was also exhibiting poor judgment in the handling of his patients.

Following his interview with Iashock, White contacted Dr. Richard Banta, a chemical dependency specialist, and requested his assistance as a consultant in plaintiff's case. Banta subsequently conducted interviews with members of the Hospital staff who had contacted with plaintiff. Among those interviewed were White, Lashock, and several nurses who worked closely with plaintiff. According to these witnesses, plaintiff was subject to mood swings, frequently reversed his position in business discussions, had a selective memory, did not accept responsibility for his own actions, became abrupt and tactless with patients, and became self-centered. Banta was also told that plaintiff was obsessed with talk of drinking and often boasted about becoming intoxicated. In addition, plaintiff would occasionally leave work and return "wired." Plaintiff was described as bizarre, paranoid, and mood-elevated. The witnesses also noted that plaintiff's appetite became sporadic and that he had developed an unusual rapport with drug company representatives. In conducting the interviews, Banta noted that while the witnesses believed that something was wrong with plaintiff, they were reluctant to speak because of a fondness and respect for him. Banta advised White that, in Banta's opinion, plaintiff had a substance abuse problem that required rapid intervention.

Acting on Banta's advice, Dr. John McHugh, vice-president of medical affairs for the Hospital, formed a committee consisting of himself, White, Rouse, and Dr. Richard Novak, first vice-president of the medical staff. On August 29, 1985, this committee met for the purpose of confronting plaintiff on his behavior and suggesting the possibility that he had an alcohol, drug, or emotional problem which required intervention. The committee requested plaintiff to submit to an evaluation by Dr. Donald Sellers, a physician experienced in treating impaired physicians. Plaintiff initially refused but relented when he was advised that his refusal to undergo the evaluation would result in the immediate revocation of his staff privileges at the Hospital. The evaluation was conducted later that day at Lutheran General Hospital in Park Ridge, Illinois.

The record is silent with respect to the results of the evaluation except to indicate that hospitalization was not required. Plaintiff resigned from the Hospital in the early part of 1986.

On August 26, 1986, plaintiff filed the instant action. Plaintiff's initial complaint was dismissed, and, on December 11, 1987, plaintiff filed a four-count amended complaint against the Hospital and White. Plaintiff's amended complaint sought recovery under theories of slander, "coercion," intentional infliction of emotional distress, and intentional interference with an employment contract. The amended complaint alleged that defendants accused plaintiff of alcohol or drug addiction or emotional instability and knew those accusations to be groundless. The amended complaint further alleged that plaintiff was coerced into undergoing a psychiatric examination and that the substance of the accusations and psychiatric evaluation were communicated to persons who did not have a legitimate interest in that knowledge.

On January 26, 1988, defendants moved to dismiss plaintiff's amended complaint pursuant to sections 2-615 and 2-619 of the Code (Ill. Rev. Stat. 1987, ch. 110, pars. 2-615, 2-619). Defendants' motion was supported by a copy of the employment contract between plaintiff and the Hospital, the deposition transcript of Dr. Banta, and the affidavits of Drs. McHugh, White, and Longanecker. The trial court granted defendants' motion pursuant to section 2-619(a)(9) after concluding that defendants presented affirmative matter which defeated plaintiff's claims. Specifically, the court found that defendants' conduct fell with the provisions of certain statutes and the Hospital bylaws entitling them to immunity. The trial court subsequently denied plaintiff's motion to reconsider, and plaintiff brought this timely appeal.

Initially, we note that defendants' motion to dismiss was brought pursuant to both sections 2-615 and 2-619 of the code (Ill. Rev. Stat. 1987, ch. 110, pars. 2-615, 2-619). It is improper for a defendant to combine separate motions under each of these sections for joint analysis and determination. (Sites omitted). However, while this improper motion practice is error and should not be condoned, it does not command

reversal unless prejudice results to the nonmovant. (Sites omitted). The record in the instant action indicates that plaintiff knew prior to the hearing that defendants sought dismissal under either section of the Code. In addition, the court continued the hearing on the motion at which time plaintiff's counsel indicated that he was prepared to address defendants' motion pursuant to section 2-619. Accordingly, we conclude that plaintiff was not prejudiced by the procedure utilized and we may proceed to the merits of the case.

Plaintiff contends that the trial court erred in granting defendants' motion to dismiss. Plaintiff argues that defendants failed to state "affirmative matter" sufficient for dismissal pursuant to section 2-619(a)(9) of the Code. We disagree.

Section 2-619(a)(9) of the Code provides that a defendant may, within the time for pleading, file a motion to dismiss on the basis that "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." (Ill. Rev. Stat. 1987, ch. 110, par. 2-619(a)(9). "Affirmative matter" sufficient to defeat a claim is something in the nature of a defense which negates the alleged cause of action completely or refutes crucial conclusions of law or conclusions of fact unsupported by allegations of specific fact contained in or inferred from the complaint. (Andrews v. Mid-America Bank & Trust Co. (1987), 152 Ill. App. 3d 139, 141, 105 Ill. Dec. 114, 503 N.E.2d 1120). It is something more than mere evidence offered to refute well-pleaded facts in the complaint which are necessarily admitted as true for purposes of the motion to dismiss. (Cites Omitted).

In the instant action, the "affirmative matter" presented in support of defendants' motion to dismiss consisted on the Hospital bylaws and two Illinois statutes which purported to give defendants immunity for the actions taken by hospital peer review committee. Although the trial court concluded that the immunity conferred by the statues was conditional and did not protect defendants from any willful and wanton acts committed in the process, if nonetheless found that the affidavits submitted by defendants indicated that their conduct was reasonable under the circumstances and fell within the

immunity provisions. Plaintiff now argues that the trial court's conclusion was error since plaintiff properly pleaded willful and wanton misconduct and defendants' affidavits only challenged those well-pleaded facts. However, in our opinion, section 10.2 of the Hospital Licensing Act (Ill. Rev. Stat. 1987, ch. 1111/2, par. 151.2), relied on by both defendants and the trial court, provides defendants with absolute immunity for the conduct alleged and supports the judgment of dismissal.

In ruling that defendants were entitled to immunity for their alleged wrongful conduct, the trial court relied on section 5 of the Medical Practice Act of 1987 (Ill. Rev. Stat. 1987, ch. 11, par. 4400-5) and section 10.2 of the Hospital Licensing Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 151.2). Section 5 of the Medical Practice Act of 1987 provides, in pertinent part:

"While serving upon any committee whose purpose, directly or indirectly, is internal quality control or medical study to reduce morbidity or mortality, or for improving patient care or physician services within a hospital duly licensed under the Hospital Licensing Act, or within a professional association of persons licensed under this Act, or the improving or benefiting of patient care and treatment whether within a hospital or not, or for the purpose of professional discipline, any person serving on such committee, and any person providing service to such committees, shall not be liable for civil damages as a result of their acts, omissions, decisions, or any other conduct in connection with their duties on such committees, except those involving wilful or want misconduct." Ill. Rev. Stat. 1987, ch. 11, par. 4400-5.

Section 10.2 of the Hospital Licensing Act similarly provides immunity from civil damages for actions taken by a hospital peer review committee. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 151.2) That statute provides:

"Because the candid and conscientious evaluation of clinical practices is essential to the provision of adequate hospital care, it is the policy of this State to encourage peer review by health care provides. Therefore, no hospital and no individual who is a member, agent, or employee of a hospital,

hospital medical staff, hospital administrative staff, or hospital governing board shall be liable for civil damages as a result of the acts, omissions, decisions, or any other conduct of a medical utilization committee, medical review committee, patient care audit committee, quality review committee, credential committee, peer review committee, or any other committee whose purpose, directly or indirectly, is internal quality control or medical study to reduce morbidity or mortality, or for improving patient care within a hospital, or the improving or benefiting of patient care and treatment, whether within a hospital or not, or for the purpose of professional discipline. Nothing in this Section shall relieve any individual or hospital from liability arising from treatment of a patient." Ill. Rev. Stat. 1987, ch. 111 1/2, par. 151.2.

Our supreme court has recently set forth these statutory provisions and noted that they "operate to grant immunity to physicians, hospitals and their staffs from civil liability for service upon peer review or other credential committees." (Barrows v. Northwestern Memorial Hospital (1988), 123 Ill. 2d 49, 58, 121 Ill. Dec. 244, 525 N.E. 2d 50; see also Gates v. Holy Cross Hospital (1988), 175 Ill. App. 3d 439, 446, 124 Ill. Dec. 897, 529 N.E. 2d 1014 ("In accordance with the Hospital Licensing Act, hospitals and their staff are immune from civil liability for services rendered while serving in the capacity of a medical care evaluation committee or peer review committee"); (cite omitted) (section 10.2 of the Hospital Licensing Act precludes recovery of civil damages as a remedy in cases arising out of acts and decisions of hospitals and individuals in internal review situations).) The *Barrows* court went on to conclude that the statutes indicated "a general legislative intention that hospitals and medical staffs be free to exercise their professional judgment in the selection and retention of medical staff members." (cite omitted) (legislative objective in providing hospital with immunity for civil damages based on peer review activities is to foster effective self-policing by medical profession and promote legitimate State interest in improving quality of health care in Illinois).

Although the trial court in the instant action dismissed the complaint on the basis of the immunity conferred by these

statutes, it nonetheless found that they conferred only conditional immunity. However, as noted above, we believe that section 10.2 of the Hospital Licensing Act grants defendants absolute immunity and controls the disposition of this appeal.

Unlike section 5 of the Medical Practice Act of 1987, which protects "any person" serving on a peer review committee (cite omitted), section 10.2 of the Hospital Licensing Act is specifically directed at protecting *hospitals and agents and employees of hospitals* for the conduct of such committees. (cite omitted). Defendants in the instant action are a hospital and a member of its administrative staff. Thus, while both statutes grant immunity for the activities of a peer review committee, section 10.2 of the Hospital Licensing Act more directly applies to these particular defendants.

In addition, unlike section 5 of the Medical Practice Act of 1987, section 10.2 of the Hospital Licensing Act does not except willful and wanton misconduct from its protection. (cite omitted). The plain and unambiguous language of section 10.2 of the Hospital Licensing Act admits of no exception to the immunity protection conferred by that statute, and we will not read into it any exception for willful and wanton misconduct. (cite omitted). In *Knapp*, the court similarly discussed the interplay between section 5 of the Medical Practice Act of 1987, at that time codified as section 2b of the Medical Practice act (cite omitted), and sections 8-2101 and 8-2102 of the Code (cite omitted). The court noted that the Code provisions bestowed an absolute privilege upon individuals insofar as concerned their statements before bodies involved in the peer review process. (cite omitted). The court further noted the immunity exception for willful and wanton misconduct contained in section 2b of the Medical Practice Act and, concluding that the statutory provisions were in conflict, ruled that the Code provisions were more specific and therefore controlled the disposition. (cite omitted). In holding that a willful and wanton misconduct exception could not be read into the Code provisions, the court stated that its "conclusion [was] reinforced by the *similarly absolute and unconditional language*

of section 10.2 of the Hospital Licensing Act." (Emphasis added). (cite omitted).

Because we conclude that section 10.2 of the Hospital Licensing Act completely negates plaintiff's claims, we find that the trial court did not err in granting defendants' motion to dismiss.

Accordingly, the judgment of the circuit court of Winnebago County is affirmed.

Affirmed.

Justice NASH, dissenting:

I do not agree with the conclusion o my colleagues that section 10.2 of the Hospital Licensing Act (Ill. Rev. Stat. 1987, ch. 111 1/1, par. 151.2) provides *absolute* immunity for all of the conduct claimed by plaintiff and would remand for further proceedings of those well-pleaded counts of the complaint which alleged wilful and wanton misconduct on the part of defendants.

In his amended complaint, plaintiff alleged that defendants made false and malicious accusations of alcohol addiction, drug addiction and mental instability of plaintiff, knowing them to be false, groundless, and spurious, and that defendants forced plaintiff to undergo a psychiatric evaluation under threat of mediate suspension of his hospital privileges. In thus extending an absolute immunity for civil liability to those acting in a peer review capacity to include any of their willful and wanton conduct while doing so, the majority has gone substantially beyond the limitations placed upon such immunity by the Illinois legislature and has extended a recent ruling by our supreme court.

Section 10.2 of the Hospital Licensing Act and section 5 of the Medical Practice Act of 1987 (Ill. Rev. Stat. 1987, sh. 111, par. 4400-5) both extend in generally similar language immunity from civil liability to physicians, hospitals and their

staffs for service upon peer review or other credentials committees. It has been held that "these statutes do indicate a general legislative intention that hospitals and medical staffs be free to exercise their professional judgment in the selection and attention of medical staff members." (*Barrows v. Northwestern Memorial Hospital* (1988), 123 Ill. 2d 49, 58, 121 Ill. Dec. 244, 525 N.E. 2d 50.) The immunity offered by each of these statutes, however, is qualified and is far from the absolute immunity here declared by the majority opinion. Section 5 of the Medical Practice Act grants immunity for conduct while serving upon a peer review committee, "except those involving wilful or wanton misconduct" (Ill. Rev. Stat. 1987, ch. 111, par. 4400-5). So too does section 10.2 of the Hospital Licensing Act provide that "nothing in this section shall relieve any individual or hospital from liability arising from treatment of a patient." (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 151.2.) The court in *Barrows v. Northwestern Memorial Hospital* considered both statutes and found, generally, that they operate to grant immunity from liability for service upon peer review or other credential committees (*Barrows*, 123 Ill. 2d at 58, 121 Ill. Dec. 244, 525 N.E.2d 50). The court declined to repudiate the doctrine that denial of hospital staff privileges is generally not subject to judicial review and that the decision of the hospital authorities in such matters is final, and affirmed the judgment of the circuit court which had dismissed that complaint on public policy ground. However, our supreme court remanded the case to the appellate court for consideration of whether the allegations in other counts of the complaint relating to interference with plaintiff's business relations, restraint of trade, and fraud were also precluded by the public policy against judicial review and the statutory enactments or were sufficient to support recovery under those counts of plaintiff's complaint. 123 Ill. 2d at 59-60, 121 Ill. Dec. 244, 525 N.E. 2d 50.

In my view, this court should give attention to those limitations upon the peer review immunity put in place by the legislature, and the caution exercised by the court in *Barrows*. We have no authority to repeal the legislative exception to immunity for wilful and wanton peer review conduct and do no service to the medical community by doing so. Under the

opinion here, any baseless or malicious accusation against a physician or hospital can be made in a supposed peer review setting with impunity. The broad scope of the conduct in which immunity may attach under section 10.2 of the Hospital Licensing Act and this opinion will be far beyond that intended by the legislature.

I would affirm the judgment below dismissing the complaint, except as to those counts which were premised upon the alleged wilful and wanton conduct of defendants and, as to them, would reverse and remand for further proceedings.

APPENDIX D

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT

COUNTY OF WINNEBAGO

MICHAEL S. CARDWELL, M.D.,	)
	)
Plaintiff,	)
	) AT LAW
v.	)
	) NO. 86 L 431
ROCKFORD MEMORIAL HOSPITAL, a corporation, and TERRY A. WHITE, Assistant Administrator of Rockford Memorial Hospital, a corporation,	)
	)
Defendants.	)

THIS CAUSE coming on to be heard on motion to dismiss filed by the defendants, and the Court having considered the motion, affidavits, the deposition of Dr. Banta, memoranda of law, and the arguments and statements of counsel, finds:

1. Defendants have presented affirmative matters which defeat all claims presented in plaintiff's Amended Complaint.

2. That any alleged action, error, omission, conduct, statement, disclosure or decision by the defendants was a result of conduct of a committee whose purpose was internal quality control, improving patient care and/or professional discipline within the terms of Ill. Rev. Stat., Ch. 111 1/2, Section 151.2.

3. Terry White acted in his capacity as the authorized agent of the hospital and as a member of the committee and is, thus, also entitled to the immunity of the statutes of Illinois and the By-laws of the hospital.

4. Defendants are entitled to immunity under the statutes of Illinois (Ill. Rev. Stat., Ch. 11, Section 4400-5 and Ch. 111 1/2, Section 151.2) and under the By-laws of Rockford Memorial Hospital Association, a corporation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Complaint of the plaintiff is dismissed in its entirety pursuant to Section 2-619 of the Code of Civil Procedure. It is further the finding of this Court, pursuant to Illinois Supreme Court Rule 304(a), that there is no just reason for delaying enforcement or appeal of this Order.

DATED:

Judge John E. Sype

Approved as to form:

_____

John R. Truitt, Esq.

_____

Richard R. Haldeman, Esq.

Supreme Court, U.S.
FILED
NOV 6, 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-557

In The

Supreme Court of the United States

October Term, 1990

MICHAEL S. CARDWELL,

Petitioner,

vs.

ROCKFORD MEMORIAL HOSPITAL,
a Corporation, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENTS' BRIEF IN OPPOSITION

JOHN C. MCCARTHY
Counsel of Record
STEPHEN E. BALOGH
TIMOTHY J. ROLLINS
WILLIAMS & MCCARTHY
321 West State St., #400
Rockford, IL 61101
(815) 987-8900
Counsel for Respondents

November 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether this Court should review a decision of the Supreme Court of Illinois regarding the construction of a state statute when no federal question has been raised, pressed or passed upon at any stage of the state court proceedings below.

2. Whether the Fourteenth Amendment Due Process Clause is applicable where a physician who is suspected of having a substance abuse problem voluntarily submitted to a psychiatric evaluation rather than invoking the procedural protection triggered by acceptance of a summary suspension of his hospital staff privileges.

3. Whether there is any state action which would invoke the protection of the United States Constitution when all of the acts complained of by a physician are alleged to have been committed by a private hospital and its employee.

THE PARTIES

Rockford Memorial Hospital is an Illinois not-for-profit corporation. It is a subsidiary of Rockford Memorial Corporation, an Illinois not-for-profit corporation. Rockford Memorial Hospital has no stock and Rockford Memorial Corporation is its sole member.

Terry A. White is an employee of Rockford Memorial Hospital.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

THE PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 6

CONCLUSION 13

APPENDIX A.1

TABLE OF AUTHORITIES

Page

CASES:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)..... 13

Clark v. Jeter, 486 U.S. 456 (1988).....7, 9

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)..... 11

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) 13

NCAA v. Tarkanian, 488 U.S. 179 (1988)..... 11

Olmstead v. U.S., 277 U.S. 438 (1928) 10

Rochin v. California, 342 U.S. 165 (1951)..... 10

Spencer v. Lee, 864 F.2d 1376 (7th Cir. 1989), *cert. denied* ___ U.S. ___, 110 S.Ct. 1317 (1990)..... 11

Tunca v. Lutheran General Hospital, 844 F.2d 411 (7th Cir. 1988).....9, 11, 12

Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891) 10

STATUTES:

28 U.S.C. § 1257(a) 2, 6

42 U.S.C. § 11101..... 12

ILL. REV. STAT. (1985), Ch. 110, § 2-619(a)(9) 4

ILL. REV. STAT. (1985), Ch. 111 ½, ¶ 151.2 5

RULES:

Sup. Ct. R. 15.1 4

Sup. Ct. R. 14.1(h).....7, 8

77 Ill. Adm. Code § 250-310(a)(3) (1984).....4, 10

No. 90-557

In The

Supreme Court of the United States

October Term, 1990

MICHAEL S. CARDWELL,

Petitioner,

vs.

ROCKFORD MEMORIAL HOSPITAL,
a Corporation, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Rockford Memorial Hospital, a Corporation, and Terry A. White, Assistant Administrator of Rockford Memorial Hospital, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Illinois Supreme Court's decision in this case.

OPINIONS BELOW

The order of dismissal of the circuit court is unreported and appears in the petition for writ of certiorari, pp. App. 23-App. 25. The opinion of the Appellate Court of Illinois, Second Judicial District, is reported at 183 Ill. App. 3d 1072, 132 Ill. Dec. 516, 539 N.E.2d 1322, and is reprinted in the petition for writ of certiorari, pp. App. 12-App. 22. The petition for rehearing in the Supreme Court of Illinois was denied May 31, 1990, and the opinion of that court is reported at 136 Ill. 2d 271, 144 Ill. Dec. 109, 555 N.E.2d 6, and is reprinted in the petition for writ of certiorari, pp. App. 2-App. 11.

JURISDICTION

The petitioner asserts that this Court has jurisdiction to review the decision of the Supreme Court of Illinois in this case pursuant to 28 U.S.C. § 1257(a).[1] Review of the opinions below reveals that the state statute involved in this case was never "drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States," as is required by section 1257(a). Accordingly, the respondents submit that this Court does not have jurisdiction to review that decision.

---

[1] The petition for writ of certiorari cites 28 U.S.C. § 1257(3) [sic] as jurisdictional authority. As there is no subsection (3) respondents assume that this is a typographical error and that petitioner is relying on subsection (a) to that statute.

STATEMENT OF THE CASE

In October, 1984, petitioner, Dr. Michael Cardwell (hereinafter "Cardwell"), a perinatologist (a specialist in the care and treatment of high risk fetuses), was employed by respondent, Rockford Memorial Hospital (hereinafter "Hospital"), as the Medical Director of the Department of Perinatology pursuant to a written contract. Respondent, Terry White (hereinafter "White") was Cardwell's immediate supervisor.

In August, 1985, White and several other Hospital employees became aware that Cardwell might have substance abuse or emotional problems.[2] On August 29, 1985, four employees of the Hospital, including White, formed a committee to confront Cardwell about the problems which were adversely affecting the quality of Cardwell's treatment of his patients. Cardwell was advised that if he did not submit to an evaluation by an expert on treatment of impaired physicians that his staff privileges would be summarily suspended, an action which would have automatically triggered certain procedural protections under

---

[2] The facts and circumstances leading to the conclusion that Cardwell may have had a substance abuse problem are outlined at length in the opinion of the Illinois Appellate Court found reprinted in the petition for writ of certiorari. (Pet. App. 13-App. 15).

the Hospital's bylaws.[3] Cardwell agreed to the evaluation. The record is silent on the results of that evaluation.[4]

On December 11, 1987, Cardwell filed a four-count amended complaint against his former employer, the Hospital, and against his former supervisor, White, individually and as Assistant Administrator of the Hospital, which alleged common law theories of slander, "coercion," intentional infliction of emotional distress and intentional interference by White with Cardwell's employment contract with the Hospital.

The defendants filed a joint motion to dismiss the amended complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure. ILL. REV. STAT. (1985), Ch. 110, § 2-619(a)(9). The defendants argued that they had

---

[3] Cardwell did not have his staff privileges at the Hospital suspended. As a result none of the procedural protections, such as a right to hearing provided by the Hospital bylaws (A.1-A.5), and the Illinois Hospital Licensing Act or its implementing regulations, 77 Ill. Adm. Code § 250-310(a)(3) (1984), were triggered. Had Cardwell refused the exam and accepted summary suspension he would clearly have been entitled to such procedural protections as a limit of ten days on the temporary suspension, written notification of recommendations for further action within seven days, and the right to a hearing on any adverse decisions concerning revocation or limitation of his staff privileges. (A.1-A.5). Cardwell remained on staff at the Hospital until his resignation in 1986.

[4] In accordance with Rule 15.1 of the Rules of The Supreme Court of The United States, respondents note that the petitioner's Statement of the Case contains a factual misstatement. Although petitioner claims that the evaluation showed no evidence of impairment, as the Supreme Court of Illinois noted, "the record is silent as to the results of the evaluation." (Pet. App. 4).

absolute immunity from civil damages for the acts alleged under the terms of section 10.2 of the Illinois Hospital Licensing Act. ILL. REV. STAT. (1985), Ch. 111½, ¶ 151.2. While the trial court rejected the concept of absolute immunity, it did find that the defendants had presented affirmative matters which defeated all claims presented under a test of conditional immunity. (Pet. App. 23-App. 24).

Cardwell appealed from the order dismissing his amended complaint, arguing on appeal that the defendants' section 2-619 motion to dismiss was not properly granted because the affidavits and deposition submitted in support of that motion were not properly "affirmative matters" within the meaning of that statute, but merely contradicted his well pleaded factual allegations. (Pet. App. 16-App. 17).

The Appellate Court held that the trial court's conclusion that the provisions of section 10.2 of The Hospital Licensing Act granted only conditional immunity was incorrect. (Pet. App. 19). The Appellate Court found that the "plain and unambiguous language of section 10.2" granted absolute immunity from civil damages for the conduct alleged, and upheld the order of dismissal on that basis. (Pet. App. 19).

Having received leave to appeal, Cardwell filed briefs with the Illinois Supreme Court which made two arguments: 1) that under common law principles of statutory construction section 10.2 of the Illinois Hospital Licensing Act should not be read as conferring a grant of absolute immunity from civil damages; and 2) that the

defendants had not followed proper motion practice at the trial court level.

The Supreme Court of Illinois affirmed the Appellate Court's holding that the language of section 10.2 was a grant of absolute immunity from civil damages to hospitals, their agents and employees, when they were acting in a professional review capacity. (Pet. App. 9-App. 11). Because this issue was dispositive of the claim the court found other matters raised in the state courts below to be "irrelevant." (Pet. App. 11).

REASONS FOR DENYING THE PETITION

This Court should deny the petition for certiorari because (1) at no time in the proceedings below was any federal question raised, pressed or passed upon; (2) no privacy rights protected by the Due Process Clause have been violated because Cardwell volunteered to submit to the psychiatric evaluation; and (3) all of the acts alleged by Cardwell were committed by a private hospital and its employee.

1. This Court lacks jurisdiction to review the decision of the Supreme Court of Illinois because no federal question was "pressed or passed upon" in the state courts.

Petitioner relies upon 28 U.S.C. § 1257(a) to give this Court its jurisdiction to review a decision of the Illinois Supreme Court. That statute confers upon the Court the jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State . . . where the

validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . . " This jurisdictional grant is commonly referred to as "federal question" jurisdiction.

This Court has held that, for the validity of a state statute to have been "drawn in question" for purposes of federal question jurisdiction, the federal question must have been "pressed or passed upon" in the state courts. *Clark v. Jeter*, 486 U.S. 456, 460 (1988) (*quoting Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988)). For a federal question to have been "pressed or passed upon," it must have been "expressly asserted" during the state court proceedings, or, at a minimum, the arguments made must have been "adequate to raise" the issue. *Clark*, 486 U.S. at 460.

A review of the pleadings and decisions from the state court proceedings in this case reveals that the state courts were asked only to construe state statutes in a manner consistent with common law principles of statutory construction and legislative intent. (Pet. App. 2-App. 25). None of the state courts ever considered the question of whether the Illinois Hospital Licensing Act violated the United States Constitution – because that question was never put to them by any of the parties.

Indeed, the Statement of the Case contained in Cardwell's petition – and its apparent violation of the Rules of this Court – highlight the fact that no federal question was raised during the state court proceedings. Rule 14.1(h) of this Court's Rules requires that in cases where a review of a state court decision is sought, the petitioner

must specify in his statement of the case "the stage in the proceedings . . . at which the federal questions sought to be reviewed were raised . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction . . . . " Sup. Ct. R. 14.1(h). The Statement of the Case in Cardwell's Petition makes no attempt to comply with this requirement, and, in fact, compliance would be impossible.[5]

The decision of the Illinois Supreme Court is nothing more than a classic exercise in the construction of a state statute. The court examined the Illinois Hospital Licensing Act in light of its statutory framework, the expressed goals of the Illinois General Assembly, and common law principles of statutory construction. It arrived at the conclusion that the Illinois Hospital Licensing Act conferred absolute immunity from civil liability on respondents for the conduct of which Cardwell complained, and thus that the dismissal of his complaint was entirely proper.[6] At no

---

[5] The lack of a federal question is also underlined by Cardwell's apparent failure to comply with Rule 29.4(c) of the Supreme Court Rules. To date the respondents have received no notice that a copy of Cardwell's petition for writ of certiorari has been filed with the Attorney General for the State of Illinois, nor has a copy of the notice that 28 U.S.C. § 2403(b) may be applicable, been received.

[6] Petitioner seems distressed that Illinois is the only state he could find which had granted such an absolute immunity. Respondents see no relevance to that argument, and would simply note that it is diversity, rather than conformity, which is the hallmark of a federal system.

time did Cardwell, or anyone else, claim that the statute so construed would be repugnant to the Constitution of the United States.

As this Court stated in *Clark*, "[t]his question of how to interpret the [state] statute ultimately is a matter of state law." *Clark*, 486 U.S. at 460. Although the Court in *Clark* was considering a question of federal preemption of a state statute, the principle involved is the same. The Supreme Court of Illinois is the ultimate arbiter on the interpretation of Illinois statutes. In this cause that court was called upon only to interpret an Illinois statute pursuant to Illinois law. This Court should refuse to review or upset the state court pronouncement on the meaning of a state statute.

2. Because Cardwell voluntarily submitted to psychiatric evaluation, rather than invoking the procedures involved in a summary suspension, no Constitutionally created privacy rights have been violated.

When Cardwell was confronted by a committee of individuals at the Hospital concerning their belief that he might be suffering from substance abuse problems he was given a choice – submit to psychiatric evaluation *or* face summary suspension of staff privileges at the Hospital. (Pet. App. 15). Had Cardwell chosen to accept summary suspension his staff privileges would have been only temporarily revoked (no more than ten days) and, in accordance with the Hospital bylaws and the Illinois Administrative Code, he would have then been entitled to "due process and fair hearing." *See Tunca v. Lutheran*

General Hospital, 844 F.2d 411, 413 (7th Cir. 1988); 77 Ill. Adm. Code § 250-310(a)(3) (1984); (A.1-A.5).

Cardwell, in his petition for writ of certiorari, relies on a line of opinions by this Court which discuss the concept of due process as protecting the right of individuals to be free from involuntary and unreasonable intrusion of their person by the State. (Pet. 7). These opinions simply have no application to this case since Cardwell consented to the psychiatric evaluation rather than choosing the avenue of a hearing which ultimately could have resulted in permanent loss of staff privileges at the hospital.

In *Rochin v. California*, 342 U.S. 165, 166 (1951), relied on by Cardwell, the petitioner had his stomach pumped, against his will and without a hearing on the propriety of the invasion, at the direction of law enforcement officers. Unlike *Rochin*, Cardwell was afforded a choice and chose not to have a hearing. Unlike *Rochin*, Cardwell consented to the psychiatric evaluation which he later underwent. And, unlike *Rochin*, Cardwell's person was not physically invaded. Other authority cited by Cardwell is similarly distinguishable.[7]

---

[7] Cardwell also cites *Olmstead v. U.S.*, 277 U.S. 438 (1928) and *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891), both of which involve involuntary physical invasions of the person by the State.

3. The acts alleged by Cardwell all involve a private hospital and its employee. There is no state action which would invoke the Constitutional protection asserted by Cardwell.

Moreover, Cardwell cannot establish a violation unless he can show that he was deprived of some protection afforded to him by the U.S. Constitution by a state (rather than a private) actor. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *see also NCAA v. Tarkanian*, 488 U.S. 179 (1988). Cardwell does not dispute that the Hospital and its administrator in this case are private actors, instead arguing that because the State of Illinois regulated the Hospital it is therefore "impregnated with governmental character." (Pet. 8).

This Court has established that the simple fact that a private actor is subject to extensive state regulation does not, by itself, convert its actions to that of the State. *Jackson*, 419 U.S. at 350. The determinative question is "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351.

The United States Court of Appeals for the Seventh Circuit has had the opportunity to address the issue of whether a heavily regulated private hospital is a state actor within the meaning of the Fourteenth Amendment. In *Spencer v. Lee*, 864 F.2d 1376 (7th Cir. 1989), *cert. denied* ___ U.S. ___, 110 S.Ct. 1317 (1990) the court held that a private hospital and private physician are not state actors in an involuntary commitment case despite extensive state regulation. *See also Tunca*, 844 F.2d at 413-414 (7th Cir. 1988). The *Tunca* opinion is especially enlightening in

view of the fact that the plaintiff in that case urged that the nexus between the private hospital and the state was created by the regulatory scheme of the Illinois Hospital Licensing Act. *Tunca*, 844 F.2d at 413. The federal appellate court, discussing the same Act relied on by Cardwell, wrote:

> There is no proof here beyond Dr. Tunca's 'say so' that the hospital's consideration of the alleged hearsay was directed by the State of Illinois.
>
> * * *
>
> Dr. Tunca's allegation that Lutheran General is a state actor simply because the State of Illinois requires it to develop procedural guidelines for considering applicants for medical staff privileges is not supported by the law in this circuit. *Tunca*, 844 F.2d at 413.

Similarly, Cardwell cannot support his allegation that the Hospital here is a state actor simply because the State of Illinois encourages it, through the Hospital Licensing Act, to engage in effective and honest self-policing.[8] Action by a private party pursuant to a state statute,

---

[8] That the State has a significant interest in encouraging active, honest and candid peer review by health care providers has never been disputed by Cardwell. Congress has specifically found that the increasing incidence of malpractice and the need for improved health care is a "nationwide problem [that] can be remedied through effective professional peer review" and that the "threat of private money damage liability . . . unreasonably discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101.

without "something more," is not enough to characterize an individual as a state actor. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). The Hospital was under no "compulsion" from the State in acting as alleged. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970). The State of Illinois took no part, either directly or coercively, in any of the actions alleged by Cardwell, and therefore Cardwell cannot show that he has been deprived of his Constitutional rights through any state action.

CONCLUSION

For all of the reasons set forth above, this Court should deny the petition for writ of certiorari in this cause.

Respectfully submitted,

JOHN C. MCCARTHY
Counsel of Record
STEPHEN E. BALOGH
TIMOTHY J. ROLLINS
WILLIAMS & MCCARTHY
321 West State St., #400
Rockford, IL 61101
(815) 987-8900
Counsel for Respondents

November 1990

APPENDIX

EXHIBIT B TO PLAINTIFF'S
AMENDED COMPLAINT[9]

BYLAWS
MEDICAL STAFF OF THE
ROCKFORD MEMORIAL HOSPITAL

* * *

ARTICLE VI – CORRECTIVE ACTION

* * *

Section 2 – Summary Suspension

A. Any of the following, the President of the Staff, Chairman of the Credentials Committee, Chairman of a clinical department, Administrative Vice-President for Medical Affairs, or the President, shall have the authority to summarily suspend a Staff member whenever immediate action is in the best interest of patient care in the Hospital. This action shall become effective immediately and cover all or a designated portion of that Staff member's clinical privileges. Such action shall be immediately documented in writing to the President of the Staff who shall bring the matter before the Medical Board as soon as possible but not longer than five (5) days after receipt of the document. Such action shall be processed as outlined in ARTICLE VII of these bylaws.

---

[9] Only those provisions of the Hospital bylaws relevant to the issues raised in the petition for writ of certiorari are reproduced in the appendix to respondents' brief in opposition. The bylaws which were in effect at the time of acts alleged in the amended complaint are in the record, in their entirety, as Exhibit B to the amended complaint.

* * *

C. A temporary suspension of all or part of a Staff member's privileges may be imposed for a period not to exceed ten (10) days, during which period an investigation shall be made by a committee consisting of the following:

1. Representative of the Medical Board who shall be chairman of the committee.
2. One (1) member appointed by the President of the Medical Staff.
3. A member of the involved Staff member's department, other than the chairman of the department.
4. Vice-President for Medical Affairs.

A report with its recommendations shall be made by the committee to the Medical Board within seven (7) days of notification of the suspension and the Medical Board shall act.

D. Any recommendation by the Medical Board for reduction, suspension or revocation of clinical privileges, or for the suspension or expulsion from the Staff, shall entitle the affected practitioner to the procedural rights provided in these bylaws under ARTICLE VII.

ARTICLE VII – HEARING AND APPELLATE REVIEW PROCEDURE

Section 1 – Right to Hearing and to Appellate Review

A. When any applicant for Staff membership or Staff member receives notice of a recommendation of the Medical Board that, if ratified by decision of the Board of Directors, will adversely affect his/her appointment or

reappointment to or status as a member of the Staff or his/her exercise of clinical privileges, he/she shall be entitled to a hearing before an Ad Hoc Appellate Hearing Committee which shall report its recommendations to the Medical Board within a reasonable time limit.

B. If the recommendation of the Medical Board, following such hearing, is still adverse to the affected applicant or Staff member, the Medical Board shall submit its recommendations, together with the record of the prior action taken with respect to the matter, to the Medical Affairs Committee of the Board of Directors for its review and recommendations to the Board of Directors for action within a reasonable time limit.

C. If any decision of the Board of Directors as to an application for appointment, reappointment to, or status as a member of the Staff is contrary to the last recommendation of the Medical Board, the Board of Directors shall refer the matter to the Joint Conference Committee for further prompt review and recommendation, and upon receipt of such recommendation, final action shall be taken by the Board of Directors within a reasonable time limit.

Section 2 – Composition of Appellate Hearing Committee

The Appellate Hearing Committee shall be composed of the chairman of each department of the Staff, one (1) member of the Staff at large, who shall be appointed by the President of the Staff and who shall be designated as chairman of the committee, and one (1) member of the Board of Directors who shall be appointed by the Chairman of the Board of Directors.

Section 3 – Request for Hearing

A. The affected applicant for Staff membership or Staff member desiring a hearing from an adverse decision of the Medical Board shall give notice thereof in writing to the President of the Staff within ten (10) days after receipt by him/her of said decision.

B. The President of the Staff shall thereupon proceed promptly to complete the appointment of the Appellate Hearing Committee. The Appellate Hearing Committee shall begin the hearing within fourteen (14) days.

Section 4 – Conduct of Hearing

A. The hearing need not be conducted strictly according to the rules of law relating to the examination and witnesses or presentation of evidence. Any matter deemed relevant to the committee may be considered.

B. The hearing is for the purpose of resolving on an interprofessional basis, matters bearing on professional competency and conduct. Therefore, neither the affected Staff member nor the Appellate Hearing Committee shall be represented at the hearing by an attorney-at-law.

C. The Medical Board shall appoint one (1) of its members or some other Staff member to represent it at the hearing. The affected applicant or Staff member shall be entitled to be accompanied by or represented at the hearing by a member of his/her profession.

D. Both the affected application or Staff member and the Medical Board shall have the right to call and examine witnesses and to introduce evidence relevant to the issue.

E. An accurate record of the hearing shall be kept by a court reporter, recording equipment, or minutes, as determined by the committee. Except as otherwise stated herein, the hearing shall be conducted in the manner determined by the committee.

* * *